

DRAFT
Town of Amherst
Zoning Board of Appeals - Special Permit
DECISION

Applicant: The Levi-Nielsen Company, Inc., 30 Boltwood Walk, Amherst, MA 01002

Owners: The Levi-Nielsen Company, Inc. (Map 17D, Parcels 21 and 24)

Location: 650-652 South East Street
(Map 17D, Parcels 21 and 24;,
R-O/PURD Zone).

Date Application filed with the Town Clerk: December 21, 2007

Nature of request: Petitioner seeks a Special Permit under Section 4.4 of the Zoning Bylaw, Planned Unit Residential Development (PURD), to construct a total of 17 dwelling units (_____ single-family homes and _____ duplex units).

Legal notice: Published in the Daily Hampshire Gazette on October 4 and October 11, 2006, and sent to abutters on October 3, 2006.

Board members: Ted Rising, Barbara Ford and Russ Frank

Submissions:

The applicants submitted the following documents:

- Memorandum dated September 28, 2006, from Scott J. Nielsen to the Amherst Zoning Board of Appeals regarding the Special Permit Application and waiver of fees;
- Document entitled “Strawberry Field: 24 Unit Condominium Community” dated September 2006, including:
 - Application, Summary & Narrative
 - Maps and Plan
 - Floor Plans & Elevations
 - Management Plan
- Memorandum and attached documents dated October 12, 2006, from Scott J. Nielsen to the Amherst ZBA regarding the proposed project’s compliance with various portions of the Amherst Zoning Bylaw;
- Site Plan dated September 18, 2006, prepared by The Berkshire Design Group, Inc., Sheet Number SPA-1, showing proposed layout of buildings and roadways, drainage and grading;
- Letter dated September 22, 2006, from Scott Nielsen and Stanley Rock to the Town of Amherst, stating that Mr. Nielsen and Mr. Rock have reached an agreement to continue to cooperate with regard to the property located at 650-652 South East Street.

- Document entitled “Strawberry Field, 24 Unit Condominium Community, 650-652 South East Street, Amherst, MA, October 2006” with sections as follows:
 - Memorandum dated October 5, 2006
 - Easement
 - Density
 - Drainage
 - Traffic, Views
 - “Aging in Place” Design Requirements
 - Site Plan Approval
 - Greater Interests of the Town
 - Conservation Commission Review.
- Memorandum and attached documents dated November 9, 2006, commenting on issues raised during the last Public Hearing as well as some new information;
- Copy of the Purchase and Sale Agreement between Stanley Rock and The Levi-Nielsen Company, undated;
- Memorandum dated November 30, [2006], from The Levi-Nielsen Company, requesting that the Board continue to hear information regarding the proposed project and requesting a continuance;
- Letter from The Levi-Nielsen Company and Stanley Rock, dated September 22, 2006, regarding an agreement to continue to cooperate with regard to the proposed development;
- Release Deed, dated December 13, 2006, from Caroline M. Flower to The Levi-Nielsen Company, Inc.;
- Memorandum dated February 7, 2007, requesting continuance of the public hearing;
- Memorandum dated April 3, 2007, requesting continuance of the public hearing;
- Memorandum dated April 5, 2007, requesting that previous public hearing documents (submitted for ZBA 2006-00024) be formally incorporated as part of the public record for the current public hearing;
- Memorandum dated August 22, 2007, requesting that the public hearing be continued;
- Memorandum dated October 23, 2007, requesting that the public hearing be continued;
- Memorandum dated December 6, 2007, requesting that The Levi-Nielsen Co., Inc., be allowed to amend its application from 24 units to 17 units, including supporting documentation;
- Memorandum dated December 11, 2007, requesting that the application be withdrawn without prejudice to due the resignation of a Zoning Board panel member.

Town staff submitted the following documents:

- United States Department of the Interior National Park Service Land and Water Conservation Fund Project Agreement (OMB No. 1024-0033, 09/80/84) regarding the \$65,550 grant for the Brickyard Conservation Area, dated December 31, 1993;
- Commonwealth of Massachusetts Executive Office of Environmental Affairs Division of Conservation Services, Federal Land and Water Conservation Fund Preliminary Application, dated 6/29/90, for \$100,000 for the Brickyard Conservation Area;
- Project Agreement (No. 25-00416) between the Town of Amherst and the Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Land and Water Conservation Fund, regarding a grant of \$57,500 to acquire the Brickyard Conservation Area, dated December 30, 1993;
- Email from Joyce Karpinski to Christine Brestrup and Jonathan Tucker, dated October 24, 2006, regarding Select Board vote to extend terms of Edward Rising and Russell Frank;
- Memorandum dated October 16, 2006, from the Planning Department to the Zoning Board of Appeals commenting on the application;

- Memorandum dated October 16, 2006, from the Fire Department to the Zoning Board of Appeals commenting on the application;
- Email from Jason Skeels, dated November 13, 2006, commenting on stormwater, traffic and sidewalks;
- Letter from Jason Skeels, Town Engineer, dated December 7, 2006, regarding review of the Grading and Drainage Plan for Strawberry Field;
- Complaint in the case of The Levi-Nielsen Co., Inc., Plaintiff, vs. Town of Amherst, Defendant, requesting Zoning Advisory Opinion, Declaratory Judgment and Equitable Relief, dated December 22, 2006;
- Plaintiff Levi-Nielsen Co.'s Memorandum of Law in Support of Motion for Partial Summary Judgment on First Claim for Relief under G.L.C. 240, Section 14A;
- Wetland Habitat Assessment, prepared by Oxbow Associates, Inc., prepared for Amherst Conservation Commission, dated December 8, 2006.

Members of the Zoning Board of Appeals submitted the following documents:

- Ted Rising, Chair Pro Tem, Zoning Board of Appeals, submitted a written statement, dated 10/16/06, entitled 2nd Strawberry Fields Panel, outlining the proposed conduct of the upcoming hearings on this application;
- Ted Rising submitted a letter, addressed to the Select Board, dated October 18, 2006, requesting that his term on the Zoning Board be extended until the end of the Nielsen case;
- Letter from South Amherst Conservation Association to Community Preservation Act Committee, dated December 13, 2006, requesting financial support to acquire land on South East Street;
- Letter from Russell M. Frank, dated December 11, 2007, resigning from the Zoning Board of Appeals effective upon completion of certain pending cases, not including ZBA FY2007-00010.

Attorneys submitted the following documents:

- A letter from Brackett & Lucas, Special Town Counsel for the Nielsen case, dated October 13, 2006, to Thomas Simpson, Chair of the Amherst Zoning Board of Appeals, in response to a letter from Carol Gray, dated September 29, 2006, regarding whether Ted Rising and Barbara Ford could sit on the panel for the current Nielsen application;
- A letter from Brackett & Lucas, dated November 13, 2006, regarding dimensional requirements and whether the 90 acres of land owned by the Town may be considered in the density calculations;
- A letter from Brackett & Lucas, dated December 6, 2006, regarding whether an easement exists on the Levi-Nielsen property which would encumber the use of the property, with attached documents including "Old Farm Road Reciprocal Easement" and plan entitled "Master Definitive Plan" prepared for Otto Paparazzo;
- A letter from Brackett & Lucas, dated October 26, 2007, explaining the Land Court's decision to dispose of Counts I and II in the case of Levi-Nielsen Co. v. Town of Amherst, including the Decision of Judge Scheier;
- An email from Brackett & Lucas, dated November 30, 2007, stating that the Land Court had disposed of Count III in the case of The Levi-Nielsen Co., Inc., v. Town of Amherst;
- A letter from Brackett & Lucas, dated December 4, 2007, stating that Levi-Nielsen Co., Inc., will not appeal the Judgment of the Land Court, including the letter from Wilhelm, Shimel & King, dated December 3, 2007, stating that The Levi-Nielsen Co., Inc., will not appeal.

Members of the public submitted the following documents:

- Letter to Thomas Simpson, Chair of the Amherst Zoning Board of Appeals, dated September 29, 2006, from Carol Gray, et al, expressing concerns about Mr. Rising and Ms. Ford sitting on the panel for the current Nielsen application, including attached documents;
- Letter from JoAnne Jones, undated, received by the Board on November 14, 2006, opposing the planned development of Strawberry Fields, with attached document entitled “Traffic Concerns” dated December 15, 2006, and letter dated May 24, 2006;
- Letter from Stanley Rock to The Levi-Nielsen Company, dated June 6, 2006, received by the Board on November 14, 2006, expressing concerns about the Agreement signed on September 25, 2005;
- Memorandum from Jesse Schwalbaum, Watershed Hydrogeologic, to Heather Colson, dated November 8, 2005, received by the Board on November 14, 2006, regarding “Hydrological Conditions and Concerns at South East St. Property”;
- Memorandum from Heather Colson, dated November 9, 2005, received by the Board on November 14, 2006, regarding flooding at Mad Woman Farm;
- Memorandum from Heather Colson, dated January 16, 2006, received by the Board on November 14, 2006, requesting that an eight foot (8’) high fence be installed along the property line.

Site Visit: October 18, 2006

- At the site visit the Board was met by the applicant, Scott Nielsen. Also in attendance were neighbors, Carol Gray, Sonya Sofield, Joanne Jones, Select Board Member Robie Hubley and Conservation Director Dave Ziomek. The Board toured the site and walked along the adjacent Norwottuck Rail Trail, observing the location of the site, the property lines, wetland resource areas, topographical features, vegetation and proposed building locations.

Public Hearing: October 18, 2006

At the public hearing Mr. Rising stated that the Board had been asked to waive the fees for this application because the previous application for a similar project had been withdrawn without prejudice due to the resignation of a Board member.

Ms. Ford MOVED to waive the fees for this application. Mr. Frank SECONDED the motion. The Board VOTED unanimously to waive the fees for this application.

At the public hearing Scott Nielsen, the applicant, presented the petition. He acknowledged that he had received the statement, dated October 16, 2006, from Mr. Rising, regarding the method that Mr. Rising proposed to follow in conducting the public hearings for the current application. Mr. Nielsen agreed to abide by Mr. Rising’s directives regarding conduct of the hearing.

Mr. Nielsen presented a substantial amount of information regarding the application, including the history of the project, details about the site and a general description of the proposed development.

Mr. Nielsen described the proposed plan with respect to the Zoning Bylaw, specifically Sections 4.4 (PURD), Section 7 (Parking and Access Regulations) and 10.3 (Special Permits).

Mr. Nielsen spoke about environmental issues, traffic issues, architecture, views and affordability.

The Board asked questions about the application, specifically with respect to drainage, open space and the Rock property. Mr. Nielsen described the proposed ownership and management of the property and the plans to build a house for Mr. Rock.

There was discussion about the need for a sidewalk along South East Street and where it would be located. Mr. Rising requested that the applicant discuss the issue of sidewalks with the Town Engineer and bring a solution to the sidewalk problem to the Board at a future meeting.

The Board noted that there were many issues and questions to be resolved. They also noted that Attorney Gary Brackett of Brackett and Lucas had been asked by the Town Manager to examine the letter dated January 19, 2006, from Alan Seewald with respect to issues about the donated land, the existence of an easement and whether the Rock house could be considered an affordable unit.

Members of the public spoke at length in opposition to the application. They were as follows: Carol Gray of 815 South East Street, Nick Thaw of 666 South East Street, Jeff Lee of 815 South East Street, Heather Colson of 784 South East Street, Sonya Sofield of 1339 South East Street, and Joanne Jones of 611 South East Street.

Mr. Rising noted that the public has access to all of the information submitted to the Zoning Board. The Planning Department in Town Hall has all of the files.

The Board discussed the scheduling and format for future meetings.

Ms. Gray stated that the Zoning Board's Rules and Regulations spell out the hearing procedure.

Mr. Frank MOVED to continue the evidentiary portion of the hearing to Tuesday, November 14, 2006, at 7:30 p.m. Ms. Ford SECONDED the motion. The Board VOTED unanimously to continue the hearing.

Continued Public Hearing: November 14, 2006

Mr. Rising opened the hearing by stating that two important documents had been received by the Board:

- An email from Jason Skeels, dated November 13, 2006, commenting on stormwater, traffic and sidewalks;
- A letter from Brackett and Lucas dated November 13, 2006, containing an opinion that the Board cannot consider the land that the Town already owns in its deliberations on the project and that the applicant should be limited to the land that it owns or controls.

Mr. Rising outlined the alternatives that the Board may consider:

- Continuing the public hearing process;
- Asking the applicant to withdraw without prejudice and then approving the request to withdraw;
- Asking the applicant to reduce the density of the project so that it falls within the limits set by the Bylaw for the acreage controlled by the applicant; in this case the applicant should withdraw the current proposal and resubmit a new, less dense proposal.

Mr. Nielsen introduced the members of his party who were appearing on behalf of the application: Jody Dole of The Levi-Nielsen Company, Brad Shimel, Attorney for the applicant, and Bruce Hilson, traffic consultant. Mr. Nielsen stated that he would like to respond to the letter from Town Counsel Brackett.

Mr. Nielsen and Attorney, Brad Shimel, made statements with respect to the issue of the land that had been donated by Mr. Nielsen's predecessor.

Mr. Rising stated that he was willing to hear a presentation on traffic and that the other information could be presented at a future time. Ms. Ford agreed. Mr. Rising asked members of the public focus on traffic issues.

Bruce Hilson of Traffic Engineering Solutions gave a presentation regarding traffic issues and impacts with respect to this proposed development.

Mr. Frank asked several questions about the traffic study and expressed his concerns about the validity of the conclusions reached by the study.

Mr. Rising asked for comments from the public on the issue of traffic only.

Connie Lentz of 32 Mountain View Circle, JoAnne Jones of 611 South East Street, Heather Colson of 784 South East Street, Bob Wellman of 60 Valley View Circle, Carol Gray of 815 South East Street, Bart Bouricious of 32 Mountain View Circle, Stanley Rock of 652 South East Street and Avril Wellman of 60 Valley View Circle spoke about traffic issues with regard to the proposed development.

Mr. Rising stated that the Board would not take any more testimony at this session of the public hearing.

Mr. Rising asked the applicant to talk about architecture, the cart path and drainage at the next session.

Ms. Ford MOVED to continue the evidentiary portion of the public hearing to December 7, 2006, at 7:30 p.m. Mr. Frank SECONDED the motion. The Board VOTED unanimously to continue the evidentiary portion of the public hearing.

Continued Public Hearing: December 7, 2006

Mr. Rising read the Introduction and the Agenda. He then listed documents that had been submitted either during the November 14th public hearing or since that time. The documents include the following, which are listed among the submittals at the beginning of this Decision:

- A letter from Brackett & Lucas about the cart path and easement issue;
- Material submitted by Joanne Silver Jones regarding traffic, views and concerns about appropriateness of the development;
- A letter from Stanley Rock to The Levi-Nielsen Company;
- A Purchase and Sale Agreement, undated, between The Levi-Nielsen Company and the Rock Family;
- A memorandum from Jesse Schwalbaum, hydrologist;
- A memorandum from Heather Colson;
- A letter from The Levi-Nielsen Company regarding architecture, views and alternative development methods;
- Documents related to the lawsuit against the Town by Levi-Nielsen;
- The Old Farm Road Reciprocal Agreement;
- A letter from Jason Skeels to the Zoning Board of Appeals, dated December 7, 2006, about drainage.

Mr. Rising thanked the people who presented the information on traffic and hydrology.

Mr. Rising stated that in view of the pending litigation against the Town by The Levi-Nielsen Company the Board had been advised that they should enter into Executive Session to hear from the Special Town Counsel, Gary Brackett.

Ms. Ford MOVED that the Board go to into Executive Session to discuss pending litigation. Mr. Rising SECONDED the motion. The Board VOTED unanimously to go into Executive Session.

Mr. Brackett then advised the Board that a roll call vote of Zoning Board members was required to go into Executive Session to discuss strategies with respect to pending litigation since an open meeting would have an impact on pending litigation.

Mr. Frank MOVED to amend the former motion to go into Executive Session to discuss strategies with respect to pending litigation since an open meeting would have an impact on pending litigation. Ms. Ford SECONDED the motion. The Board conducted a roll call vote:

Russ Frank – YES

Barbara Ford – YES

Ted Rising – YES

Michael Pill, attorney for The Levi-Nielsen Company, stated that his client had no objection to the Executive Session.

The Executive Session was conducted. Open session of the public hearing resumed at 8:11 p.m.

Mr. Rising discussed the position of the Town vis-à-vis the lawsuit. He asked Mr. Brackett to explain what had been decided in Executive Session. Mr. Brackett stated that the Board had voted to continue the public hearing to a date certain. He stated that there would be a meeting with Mr. Brackett, Town staff, Mr. Nielsen and his attorneys to see if the issues related to the lawsuit could be resolved. He stated that the Town would like to resolve the issues without a lawsuit.

Mr. Frank MOVED to continue the public hearing to February 8, 2007, at 7:30 p.m. Ms. Ford SECONDED the motion. The Board VOTED unanimously to continue the public hearing.

Ms. Gray requested that she be able to attend the meeting. Mr. Brackett explained that the meeting was an attempt to resolve litigation and that therefore only parties to the litigation would be involved in the meeting. There was no intent to circumvent the public hearing process. Mr. Brackett confirmed that no members of the Zoning Board of Appeals would be present at the meeting. Mr. Brackett stated that he would provide the Board with a status report at an Executive Session when the public hearing is resumed on February 8, 2007.

Continued Public Hearing: February 8, 2007

Mr. Rising called the public hearing to order. Mr. Rising MOVED that the Board go into Executive Session for the purpose of discussing pending litigation. Ms. Ford SECONDED the motion. The Board conducted a roll call vote:

Russ Frank – YES

Barbara Ford – YES

Ted Rising – YES

Mr. Brackett advised the Board that the Minutes should reflect resumption of open session after the Executive Session. The Board conducted the Executive Session. At 8:15 p.m. the public session was resumed. Mr. Rising stated that the Board planned to continue the public hearing to a date certain.

Mr. Frank MOVED to continue the evidentiary portion of the public hearing to April 5, 2007, at 7:30 p.m. Ms. Ford SECONDED the motion. The Board VOTED unanimously to continue the evidentiary portion of the public hearing.

Continued Public Hearing: April 5, 2007

Mr. Rising opened the session at 7:37 p.m. by reading the Zoning Board of Appeals introduction and agenda.

Ms. Ford MOVED to adjourn to Executive Session in order to hear from Town Counsel, Gary Brackett, with regard to pending litigation. Mr. Frank SECONDED the motion.

Mr. Frank – YES

Ms. Ford – YES

Mr. Rising – YES.

The Board conducted the Executive Session. The Board resumed the public hearing at 8:20 p.m.

Mr. Rising noted that the Board had received two letters from Mr. Nielsen. The first was a request, dated April 3, 2007, for a continuation of the public hearing. The second, dated April 5, 2007, was a request to ensure that all documents submitted as part of Special Permit application ZBA FY2006-00024 be included in the present application process for ZBA FY2007-00010. Mr. Rising read the letters for the record.

Ms. Ford MOVED that the Board not formally incorporate the documents from the 2006 case into the current public document record for the 2007 case. Mr. Frank SECONDED the motion.

Mr. Rising explained that Mr. Frank had not been a party to the original case and it was unreasonable for Mr. Frank to go back and read the whole file.

Mr. Frank stated that the relevant documents should be submitted for the current hearing.

The Board VOTED unanimously not to formally incorporate the documents from the 2006 case into the 2007 case.

The Board discussed the possibility of withdrawal and resubmission. Mr. Rising noted that there would be no decision from the Land Court until the summer. Attorney Shimel again requested a continuance.

Mr. Brackett referred to the lawsuit in Land Court. He stated that on May 24th there will be a court hearing on the issues presented by the plaintiff. A decision is expected from the judge in June.

Mr. Brackett stated that in fairness to the Board, since there has been no public testimony since November the Board needs refreshing on the information previously presented.

Mr. Rising suggested that the Board take a vote on whether to continue the public hearing. He noted that a decision from the court is expected in June. He stated that Thursday, June 28th would be an appropriate date for a continued hearing.

Mr. Frank MOVED to continue the public hearing to June 28, 2007, at 7:30 p.m. Ms. Ford SECONDED the motion. The Board VOTED unanimously to continue the public hearing.

Continued Public Hearing: June 28, 2007

Mr. Rising was not available to attend the continued public hearing on June 28, 2007. Therefore a quorum could not be reached. In addition, the Board had not yet received an opinion from the Land Court regarding Mr. Nielsen's lawsuit, and Board members were reluctant to act on the application prior to hearing from the Land Court. Mr. Frank MOVED to continue the public hearing to August 23, 2007, at 7:30 p.m. Ms. Ford SECONDED the motion. The two members of the Board who were present VOTED unanimously to continue the public hearing to August 23, 2007.

Continued Public Hearing: August 23, 2007

Mr. Rising read a letter from the applicant, Scott Nielsen, dated August 22, 2007, requesting a continuance of the public hearing for Strawberry Field PURD since an opinion from the Land Court on the lawsuit filed by Mr. Nielsen had not yet been received.

Mr. Frank MOVED to continue the public hearing. Mr. Rising SECONDED the motion. The Board discussed the alternatives to continuing the hearing, such as denial of the application or recommending to the applicant that he withdraw his application and then the Board would vote to approve the withdrawal without prejudice, allowing the applicant to reapply at a later date. The Board also discussed a date for a continued hearing.

After the discussion Ms. Ford MOVED to continue the public hearing to October 25, 2007, at 7:30 p.m. Mr. Rising SECONDED the motion. The Board VOTED unanimously to continue the public hearing.

Continued Public Hearing: October 25, 2007

Mr. Frank was unable to attend. Ms. Ford MOVED to continue the public hearing to December 11, 2007, at 7:30 p.m., due to lack of a quorum and due to lack of a decision from the Land Court judge. Mr. Rising SECONDED. The two Board members VOTED unanimously to continue the public hearing.

Continued Public Hearing: December 11, 2007

Mr. Frank announced his intent to resign from the Zoning Board of Appeals, due to work and family commitments, effective upon completion of certain pending Zoning Board of Appeals cases in which he is still involved. The list of cases does not include that of The Levi-Nielsen Co., Inc. Mr. Frank presented a letter of resignation to the Chair, Mr. Rising.

Mr. Nielsen asked the Board to approve withdrawal of his application without prejudice.

Special Town Counsel, Gary Brackett, stated that the current case cannot be continued by substituting a new panel member for Mr. Frank, because there had been public hearing proceedings in which Mr. Frank had participated and a new panel member would not have participated in these proceedings. Therefore a new substitute panel member would be ineligible to vote in the current case. Mr. Brackett recommended that Mr. Nielsen withdraw his current application and submit a new application.

Mr. Nielsen noted that he had filed a lawsuit and had lost the suit. Therefore he is planning to amend his proposed development by reducing the number of units from twenty-four (24) to seventeen (17), in order to comply with the dimensional requirements of the Zoning Bylaw. Mr. Nielsen requested that the two remaining panel members, Mr. Rising and Ms. Ford, remain on the panel for the new application. He also requested that the fees for the new application be waived.

Zoning Board Decision

Ms. Ford MOVED to approve the request for withdrawal without prejudice. Mr. Frank SECONDED the motion. The Board VOTED unanimously to approve the withdrawal without prejudice.

Mr. Frank MOVED to recommend to the new Zoning Board panel that the fees be waived for the filing of Mr. Nielsen's new application for a Special Permit for a seventeen-unit PURD development on this property. Ms. Ford SECONDED the motion. The Board VOTED unanimously to approve the recommendation to waive the fees.

For all the reasons stated above the Board VOTED

of the application for a Special Permit, under Section 4.4 of the Zoning Bylaw, Planned Unit Residential Development (PURD), to construct a total of 17 dwelling units (_____ single-family homes plus _____ duplex units) as applied for by The Levi-Nielsen Company, Inc., Scott Nielsen, President, at 650-652 South East Street, (Map 17D, Parcels 21 and 24, R-O/PURD Zone).

EDWARD RISING

BARBARA FORD

HILDA GREENBAUM

FILED THIS _____ day of _____, 2008 at _____,

in the office of the Amherst Town Clerk _____.

TWENTY-DAY APPEAL period expires, _____ 2008.

NOTICE OF DECISION mailed this _____ day of _____, 2008
to the attached list of addresses by _____, for the Board.

NOTICE OF PERMIT or Variance filed this _____ day of _____, 2008,
in the Hampshire County Registry of Deeds.